CORROBORATION OF INFANT'S TESTIMONY IN SEX CRIMES

State v. Porcaro
6 N.Y.2d 248, 160 N.E.2d 488 (1959)

Defendant was indicted for first degree sodomy, second degree assault and impairing the morals of a minor, his ten year old stepdaughter. The child's sworn testimony of regular sexual intercourse, both in the usual manner and orally, for the previous four years was uncorroborated by other evidence. The jury convicted defendant of impairing the morals of a minor.[1] Timely and repeated demands by the defendant for a physical examination of the prosecutrix were refused. The trial court entered judgment on the verdict convicting defendant of impairing the morals of a minor which the appellate division of the supreme court affirmed.[2] The court of appeals reversed by a 4-3 decision on the ground that the sworn testimony of the alleged victim was insufficient to sustain conviction, especially in the absence of findings from a physical examination.[3] The court in recognizing the policy behind an express statutory provision requiring corroboration of the *unsworn* testimony of a minor in any criminal case,[4] preferred to rely on the insufficiency of the evidence in the case rather than to construct a rule requiring corroboration of an infant's *sworn* testimony in sex crimes.[5]

At common law, the testimony of the injured person in a sex offense was alone sufficient to sustain a conviction, corroboration was not required[6] and the rule remains the same today unless changed by statute.[7] The rule

[1] N.Y. Pen. Law § 483(2) "A person who wilfully causes or permits such child (actually or apparently under the age of sixteen) to be placed in such a situation . . . (where) . . . its morals (are) likely to be impaired is guilty of a misdemeanor."

[2] 6 App. Div. 2d 680, 174 N.Y.S.2d 447 (1958).

[3] People v. Porcaro 6 N.Y.2d 248, 189 N.Y.S.2d 194, 160 N.E.2d 488 (1959).

[4] N.Y. Code Crim. Proc. 392. Rules of Evidence; Evidence of Certain Children, How Received . . . ". . .Whenever in any criminal proceedings, a child actually or apparently under the age of twelve years, does not in the opinion of the court . . . understand the nature of the oath, the evidence of such child may be received though not given under oath. . . . But no person shall be held or convicted of an offense upon such testimony unsupported by other evidence."

[5] See Fuld, J. concurring opinion in State v. Porcaro (supra note 3) which argues for a rule requiring corroboration in sex crimes.

[6] Boddie v. State, 52 Ala. 395 (1875); State v. Ellison, 19 N.M. 428, 144 Pac. 10 (1914); 7 Wigmore, "Evidence" § 2061 (3d ed. 1940); 20 Am. Jur. "Evidence" § 1222 (1939); and extensive annotation in Annot., 60 A.L.R. 1124 (1929). *Contra,* State v. Bowher, 40 Idaho 74, 231 Pac. 706 (1924); Matthews v. State, 19 Neb. 330, 27 N.W. 234 (1886); see also *infra* note 13.

[7] See for example, N.Y. Pen. Law § 71 (abduction), § 103 (adultery), § 1091 (compulsory prostitution of wife), § 1455 (compulsory marriage), § 2013 (rape), § 2177 (seduction), § 2460 (compulsory prostitution). Compare with above for a different statutory treatment, Ohio Rev. Code § 2945.63 concerning seduction under promise of marriage or seduction by a teacher, which provides that ". . . a conviction shall not be

applies to all sex offenses including rape,[8] statutory rape,[9] seduction,[10] bastardy,[11] and incest.[12] However, some courts require the testimony to be "clear and convincing"[13] or else be corroborated; and others, remembering the admonition of Lord Chief Justice Hale that rape "is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, tho never so innocent,"[14] reverse convictions of sex crimes regularly when there is no corroboration of *sworn* testimony, but rely on the ground that the "evidence is insufficient to sustatin the finding of guilt beyond a reasonable doubt."[15]

The principal case, *State v. Porcaro,* was decided the same day as *People v. Oyola,*[16] a very similar case; and both decisions noted the absence of corroboration of the prosecutrix's sworn testimony. The importance of both decisions is that they did not establish a technical rule of law requiring corroboration in infant sex crimes, but rather relied in the opinions on the rule that the evidence was insufficient to sustain a conviction beyond a reasonable doubt. Judge Fuld in his concurring opinion wished to make an explicit rule always requiring corroboration in sex offenses,[17] but Van Voorhis J., Conway C. J., and Froessel J., refused to do this. A technical rule of corroboration is justly criticized by Wigmore as a "crude and childish" measure[18] and completely inadequate to safeguard the defendants who are victims of fraudulent complaints. The court is to be commended for their due caution in refusing to allow the conviction to stand, yet steering carefully away from an artificial rule which obstructs justice in a clear case. A safer protection for defendants is Wigmore's suggestion[19] of a required psychiatric examination of the female complainant in a sexual crime at the

---

had on the testimony of such female, unsupported by other evidence. . . ."; however, no other requirement of corroboration by statute or decision exists in sex crimes. 15 Ohio Jur. 2d "Criminal Law" § 463-5 (1955); 28 Ohio Jur. 2d "Incest" § 13 (1958); 10 Ohio Jur. 2d "Abortion" § 17 (1954). Collection of statutes in Wigmore as cited in *supra* note 6 at 346 *et seq.*

[8] Boddie v. State, *supra* note 6; People v. Keith, 141 Cal. 686, 75 Pac. 304 (1904).

[9] Lear v. Commonwealth, 195 Va. 187, 77 S.E.2d 424 (1953).

[10] State v. Seiler, 106 Wis. 346, 82 N.W. 167 (1900).

[11] McGuire v. State, 84 Ariz. 342, 326 P.2d 362 (1958).

[12] People v. Gibson, 301 N.Y. 244, 93 N.E.2d 827 (1950). For comprehensive listing of cases see citations to Wigmore and A.L.R. *supra* note 6.

[13] People v. O'Conner, 412 Ill. 304, 106 N.E.2d 176 (1952), Brown v. State, 127 Wis. 193, 106 N.W. 536 (1906).

[14] L.C.J. Hale, 1 Pleas of The Crown 633, 635 (1680).

[15] New York is an excellent example of this in the following cases, all of which were rendered without opinion and reversed convictions of various sex crimes against minors. People v. Myers, 309 N.Y. 837, 130 N.E.2d 622 (1955); People v. Rosen, 293 N.Y. 683, 56 N.E.2d 297 (1944); People v. Derner, 288 N.Y. 599, 42 N.E.2d 605 (1942); People v. Slaughter, 278 N.Y. 479, 15 N.E.2d 297 (1938).

[16] 6 N.Y.2d 259, 189 N.Y.S.2d 203, 160 N.E.2d 494 (1959).

[17] 160 N.E.2d 488, 490.

[18] 7 Wigmore, "Evidence" § 2061 (3d ed. 1940).

[19] 3 Wigmore, "Evidence" § 924a (3d ed. 1940).

request of the defendant. Numerous medical authorities[20] and other writers[21] have advocated this because they "know how frequently sexual assault is charged or claimed with nothing more substantial supporting the belief than an unrealized wish or unconscious, deeply suppressed sex-longing or thwarting."[22] Decidedly, statutory treatment is needed for a mandatory psychiatric examination of complainants in sex offenses. This is especially true in cases like the principal one, where the credibility of the prosecutrix is questionable because of her age and immaturity. A recent Indiana case,[23] illustrates the necessity of a statute by affirming a conviction of assault and battery on no other evidence than the uncorroborated testimony of an admitted perjurer, and holding that the court had no power to require a prosecutrix to submit to a physical or psychiatric examination.

James R. Miles

---

[20] See citations in Wigmore above.

[21] 1937-38 A.B.A. Committee on the Improvement of the Law of Evidence as cited in Wigmore above; McKinney, "Pre-Trial Psychiatric Examination as Proposed Means for Testing the Complainant's Competency to Allege a Sex Offense," 1957 U. Ill. L.F. 651.

[22] Dr. W. F. Lorenz as reported in 3 Wigmore, *supra* note 19, at 465.

[23] Wedmore v. State, 237 Ind. 212, 143 N.E.2d 649 (1957).